IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2568 of 1999
To
FIRST APPEAL No. 2570 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL SHAMBHUBHAI BHAICHANDDAS - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Defendant(s)

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Appearance :
MR AJ PATEL with MR JAYESH M PATEL for Appellant(s) : 1,
MS HANSA PUNANI, AGP for Respondent (s) : 1,
MR RAJNI H MEHTA with MR AJAY MEHTA for Respondent (s) : 2,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 27/12/2006

CAV COMMON JUDGMENT :

This group of appeals arises from a common decisions rendered by the Assistant Judge, Mehsana, in Land Reference Cases No. 2131/1993,

2132/1993 and 2133/1993. The date of the judgment and award is 2nd September, 1998. The original applicants have preferred these appeals to challenge the decision of the Court regarding the quantum of compensation determined by it for the land under temporary occupation of the respondents.

2. The appellants are the owners of agricultural lands [the “land” for short] situated on the outskirts of village Chalasan, Taluka Kadi, District Mehsana. As the land was required for drilling oil wells, the Project Manager, ONGC, Mehsana Project, submitted a proposal for temporary occupation of the land. Since it appeared to the appropriate Government that land was needed for public purpose, the said proposal was accepted by it and in pursuance thereof, it exercised powers under section 35 (1) of the Land Acquisition Act, 1894 [hereinafter referred to as 'the Act'] and directed the Collector to procure the occupation of the land. After complying with the necessary formalities, the Collector procured the occupation of the land on 30th July, 1991 by private negotiations. The Collector thereafter fixed the compensation which can also be termed as rent for the land under occupation, on 16th September, 1991 at Rs.0=80 paise per sq. mtr., per year. Since the appellants were totally dissatisfied with the rate of compensation fixed by the Collector they raised dispute. The Collector referred the difference as to the sufficiency of compensation to the Court for its decision under Section 35 (3) of the Act. The proceedings were numbered as Land Acquisition Reference Cases No.

2131/1993, 2132/1993 and 2133/1993. Before the Civil Court the claim was made for Rs.7/- per sq. mtr., per year. The claim was based on the averments that the land was fertile land; there was facility of irrigation and the appellants obtained various crops in three seasons. According to them, annual income from the agricultural produce was Rs.35,000/- to Rs.40,000/-. It was also averred that the village Chalasan had various facilities such as electricity, water supply, school, hospital, etc. On these averments, it was pleaded that the compensation at the rate of Rs.0=80 paise per sq. mtr., was hopelessly inadequate and the appellants deserved to have it at the rate of Rs.7/- per sq. mtr.

2.1. The aforesaid case of the appellants was resisted by the respondents by filing written statement and they denied the averments of the appellants. According to the respondents, the rate of compensation determined by the Collector was just, fair and adequate and there was no need to enhance it. Parties led oral as well as documentary evidence to substantiate their respective averments.

2.2. On the basis of the material produced before it, the Reference Court arrived at a conclusion that the appellants proved that compensation fixed and paid to them was inadequate. The Court also held that the appellants were entitled to receive Rs.1=90 paise per sq. mtr., per year as additional

compensation. Accordingly, the Court awarded compensation at the rate of Rs.2=70 paise per sq. mtr. Since the appellants are dissatisfied with the rate of compensation fixed by the Reference Court, now they have approached this Court by filing the present appeals.

3. I have heard Mr. AJ Patel, learned advocate appearing with Mr. Jayesh Patel for the appellants, Ms. Hansa Punani, Ld. AGP for respondent no. 1 - State and Mr. Ajay R Mehta, learned advocate for respondent no. 2 - ONGC. They have taken me through the record of these appeals. Common evidence has been recorded in all the three reference cases.

3.1. Submission of Mr. AJ Patel is that the Reference Court has not properly appreciated the evidence produced on behalf of the appellants and in particular the oral evidence of the witnesses examined by them. By referring to the deposition of appellant of First Appeal No. 2568 of 1999, namely Shambhubhai Bhaichandbhai Patel Exh. 9, Mr. Patel has submitted that the learned Judge has not taken into consideration this reliable and cogent evidence without assigning any proper reason for ignoring it even when it has remained uncontroverted. According to him, the Reference Court ought to have awarded the full amount i.e. Rs.7/- per sq. mtr. Mr. Patel has further submitted that the agreement for occupation of the land was only for three years, even then, till this date the possession is not returned to the appellants. He has submitted that

the claimants are poor farmers. They have been deprived of the land right from July, 1991 till this date. However, they are not getting the return by way of compensation equivalent to the annual income that they could have earned had they been in possession of the land. The occupation of the land by respondent no. 2 is unauthorized and illegal. He has further submitted that there may be some increase in rent by the ONGC, but that is merely an eye wash as compared to the loss suffered by the claimants. According to him, the rent paid by the ONGC was lesser than the prevailing market rent and therefore the Court is required to determine compensation at the rate of market rent. He has submitted that every year atleast 10% increase should be given in the compensation. According to him, under section 35(3) of the Act, the Reference Court has power to resolve the dispute with regard to the rate of compensation and award just compensation even for the period beyond three years if the possession is continued. He has, therefore, submitted that the appellants deserve to receive mesne profits at the rate of correct market rent since the possession of the ONGC is unauthorized, illegal and wrongful. He has submitted that section 53 of the Act prescribes that save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act. He has also placed reliance on the provisions of Order 20 Rule 12. He has, therefore, submitted that just as the Court has power to pass order regarding rent or mesne profits in a suit for recovery of possession of immovable property, the

Reference Court, even assuming that it has no power to award compensation after a period of three years, it can award the mesne profits which could be equivalent to the just compensation. It may be stated here that no such ground has been taken by the appellants in the memorandum of appeal and it is sought to be advanced before this Court for the first time. However, considering the fact that this is a mixed question of fact and law, the learned advocate has been permitted to raise it. To substantiate his submissions of mesne profits he has placed reliance on several decisions, which I will discuss in due course. He has made submission on the scope of reference and has submitted that even when the occupation is beyond three years, the reference can lie. He has placed extensive reliance on the decision rendered by the Division Bench of this Court dated 6th November, 2001 rendered in the case of General Manager v. Special Land Acquisition Officer in First Appeal No.3658 of 2001 and its allied matter. He has submitted that in the case before the Division Bench the occupation of the land was beyond the period of three years. Inspite of that, the Court entertained the appeal and determined the just compensation. He has drawn my attention to observation made on page 4, which is as under:-

> "As a matter of fact, after a period of three years the beneficiary will have no right to retain possession of the land. Once possession is taken, ONGC enters into an agreement."

According to Mr. Patel, ONGC is a mighty corporation (now company) and it

should not exploit poor farmers but it should pay them just compensation and revise it regularly since the Apex Court in several cases has pointed out that 10% rise should be taken as average per year. According to him, market price for agricultural land can be determined by adopting three methods (1) sale instances, (2) award of the Court and (3) yield method. In the case of temporary occupation the market rent has to be fixed on the basis of the annual income i.e., yield method. He has submitted that section 35 deals with compensation for temporary occupation. It is for the loss suffered by the person on account of temporary occupation of his land. For determining the loss and the rate of compensation, yearly income has to be seen. He has submitted that State should not take shelter under technicalities.

3.2. As against that, Mr. Ajay Mehta, learned advocate for the ONGC has submitted that the rate of compensation per square meter decided by the Court is just and proper considering the then prevailing rent of the land. The claimants have no reason to make any grievance because periodically the rent is voluntarily being revised upwardly by the ONGC by negotiations and the same is being accepted by them. Hence the possession cannot be said to be illegal, wrongful or unauthorized. It is his submission that new rent is contractual rent and any dispute with regard to such rent cannot be entertained by the Reference Court. For that purpose, the claimant has to approach the Civil Court. It is his submission that beyond the period of three years, the Collector has no

jurisdiction to deal with the land under section 35. According to Mr. Mehta at no point of time the farmers have made any effort to recover the possession of the land in question. It is submitted that instead of cultivating the land, the farmers found it more profitable to give it on rent to ONGC and earn more money and that too without putting in any labour of cultivation. It is submitted by Mr. Mehta that the judgment of the Division Bench has no relevance because before that Bench the questions with regard to period of temporary occupation and the powers of Collector under section 35 were not directly under consideration. According to Mr.Mehta, the ONGC can never be termed as unauthorized occupant because the appellants have willingly accepted the increase in rent and thereby permitted ONGC to retain possession, hence no mesne profits can be awarded. He has submitted that the Reference Court has no plenary jurisdiction. According to him, section 63 of the Civil Procedure Code will apply to present proceedings. He has submitted that awarding mesne profits is not within the jurisdiction of the Reference Court and as this court continues to exercise appellate jurisdiction of the first instance, it also cannot award mesne profits. He has submitted that the annual 10% rise relates to market value of the land and compensation under section 35 has no relevance with market value. He has further submitted that oral evidence of the appellants does not inspire confidence. He has stated that increase of 10% to 15% in 4 years is otherwise also granted by the ONGC. He has submitted that judgment at Exh. 10 produced by the appellants, pertains to irrelevant instance of land

and that data cannot be adopted. He has placed reliance on the judgment of Ld. Single Judge of this court rendered in the case of ONGC v. Pandya Prahladbhai Manilal & ors., in First Appeal Nos. 1048 of 2006 and its allied matters and in particular, page 8 and onwards. According to him, the learned Single Judge had directly considered and dealt with provisions of sections 35 and 36 of the Act. Whereas these aspects were never before the Division Bench in the case of General Manager v. Special Land Acquisition Officer (supra). To support his submissions on the points, he has relied upon decisions of Apex Court reported in Delhi Cloth & General Mills v. Its Workmen reported in AIR 1967 S.C. 469 para 9, (2006) 5 S.C.C. p. 127], Brij Behari Sahan v. State of U.P reported in (1986) 3 SCC 564, Union of India V. Banvarilal & Sons (P) Ltd., reported in (2004) 5 S.C.C. 304, 2006 (2) GLR p.1152, Basant Kumar v. Union of India reported in (1996) 11 SCC p. 542.

3.3. Ms. Punani, Ld. AGP appearing for the State has more or less adopted the submissions of ONGC.

4. Before I deal with the submissions, provisions with respect to temporary occupation are required to be looked into.

4.1. Part-VI of the Act deals with temporary occupation of the land, which contains sections 35, 36 and 37. The legislative history of these

provisions can be traced back to the year 1861. This can be found from the report of the Select Committee dated 23rd March, 1898. The Select Committee in para. 10 of the report observed as under :-

> "Part VI of the Act deals with occupation of land by the Government for temporary purposes as opposed to permanent acquisition by the Government under the preceding part of the Act which under the land 'vested absolutely in the Government free from all other estates, rights, titles and interest'. In the year 1861 it was found necessary to amend the Act (IV of 1857) on two points, Act II of 1861 provided for the case of an acquisition of land needed for the construction of any road, canal or railway, and authority was given form the temporary occupation of adjacent lands not more than 100 yards, and in certain cases not more than two miles from the 'centre line' of the same, for the purpose of taking earth or other materials for making or repairing the same, or for depositing earth, etc, thereon, or for erecting temporary buildings or workshops or for the construction of temporary roads or railway. The full value of all 'clay, stone, gravel, sand and other materials taken therefrom 'was to be given as agreed upon, or, in the event of any dispute, by an award, as in the case of a permanent acquisition".
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> They further said : "Part VI of the revised Bill, as of the present Act (X of 1870), concerning the temporary occupation of land permits a reference to the civil court as to the sufficiency of the Collector's compensation. The Government of Bombay and the North Western Provinces have asked that the reference may include a question as to the apportionment of the compensation. We have adopted this suggestion." In this background the legislature has framed provisions regarding

temporary occupation.

Sections 35, 36 and 37 read as under :-

"35. Temporary occupation of waste or arable land, procedure when difference as to compensation exists.- (1) Subject to the provisions of Part VII of this Act, whenever it appears to the appropriate Government that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a company, the appropriate Government may direct the Collector to procure the occupation and use of the same for such terms as it shall think fit, not exceeding three years from commencement of such occupation.

(2) The Collector shall thereupon give notice in writing to the persons interested in such land of the purpose for which the same is needed, and shall, for the occupation and use thereof, for such term as aforesaid, and for the materials (if any) to be taken therefrom, pay to them such compensation, either in a gross sum of money, or by monthly or other periodical payments, as shall be agreed upon in writing between him and such persons respectively.

(3) In case the Collector and the persons interested differ as to the sufficiency of the compensation or apportionment thereof, the Collector shall refer such difference to the decision of the Court."

[vide Gujarat Act 20 of 1965 'waste' or 'arable' words have been deleted]

"36. Power to enter and take possession, and compensation on restoration.- (1) On payment of such compensation, or on executing such

agreement, or on making a reference under section 35, the Collector may enter upon and take possession of the land and use or permit the use thereof in accordance with the terms of the said notice.

(2) On the expiration of the term, the Collector shall make or tender to the persons interested compensation for the damage (if any) done to the land and not provided for by the agreement, and shall restore the land to the persons interested therein;

Provided that, if the land has become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested shall so require, the appropriate Government shall proceed under this Act to acquire the land as if it was needed permanently for a public purpose or for a Company."

"37. Difference as to condition of land.- In case the Collector and persons interested differ as to the condition of the land at the expiration of the term, or as to any matter connected with the said agreement, the Collector shall refer such difference to the decision of the Court."

4.2. Thus, it can be seen that Chapter-VI simply deals with temporary occupation of land. It contains only three sections, namely sections 35, 36 and 37, which are inter linked. Apart from these provisions, which are subject to chapter VII which deals with acquisition in case of companies, there are no other provisions which deal with temporary occupation of the land. This chapter is a slight deviation from the other provisions. The provisions previous to Chapter VI deal with acquisition of land on permanent basis. As opposed to

that, this is merely temporary occupation for some particular public purpose for limited period.

4.3. Under sub-section (1) of section 35 the appropriate Government has to be satisfied about the need of temporary occupation or use of any land for public purpose. If it is for the company, the Government has to make inquiry as prescribed in Sec. 40 (Chapter VII) of the Act r/w. Rule 4 of Land Acquisition (Companies) Rules, 1963 prior to arriving at the satisfaction. Upon arriving at such satisfaction, the Government can grant consent and direct the Collector to procure the occupation and use of the same for such period as it shall think fit, but not beyond the period of three years. Sub-section (2) of section 35 provides for giving written notice to the person interested in the land and for determining the compensation and executing written agreement. Sub-section (3) of section 35 provides that in case there is difference with regard to sufficiency of compensation or apportionment thereof between the Collector and the person interested, the Collector shall refer such difference to the decision of the Court. Sub-section (1) of section 36 empowers the Collector to enter upon and take possession of the land upon happening of any of the three eventualities mentioned therein, namely, payment of compensation, or executing the agreement or making reference under section 35. Sub-section (2) of Section 36 enjoins upon the Collector that on expiry of the term, he shall make or tender to the persons interested, compensation for the damage, if any,

done to the land and not provided for by the agreement and shall restore land to the persons interested therein. Thus, the duty is cast upon the Collector to ascertain the damage to the land in question and, if there is any, to pay compensation for it, and to restore the possession to the original owner. Proviso to sub-section (2) of section 36 deals with the permanent acquisition in certain circumstances such as when the land has become permanently unfit for its former use and the persons interested so require. Section 37 only envisages that if there is any difference between the Collector and person interested i.e., owner with regard to the condition of the land, he shall refer the matter to the Court.

5. Keeping in view the provisions of Sec. 35 and 36 of the Act and the submissions made by the Ld. Advocate for the rival parties the questions that may arise for my consideration can be spelt out as under:

1. Whether the occupants of the land are authorized to retain the possession of the land beyond the maximum period of 3 years ?

2. Whether the subsequent occupation of the land by the ONGC can be termed as unauthorized possession in the present facts and circumstances ?

3. Whether the collector has power to refer the difference as to the sufficiency of compensation for the period subsequent to expiration of the term agreed upon by the parties or the maximum period of 3 years ?

4. When such reference is made whether decision of the court on such reference can be said to be legal and in accordance with provisions of this Chapter?

5. Even if the reference u/S. 35 is made by the collector within the stipulated period or within 3 years, can the decision of the court cover the period subsequent to expiration of maximum 3 years ?

6. In the event collector failing to restore the possession as per Sec. 36(2) of the Act on expiry of maximum period of three years what is the remedy available to the person interested in the land ?

7. Whether the appellants are entitled to mesne profits ?

8. Whether the appellants have made out a case for grant of additional compensation by this court and if yes, at what rate and upto what period ?

5.1. As can be seen from foregoing discussion, the procedure for temporary occupation of land, is substantially contained in Sections 35 and 36 of the Act. The said procedure of-course is subject to Chapter VII which deals with acquisition of land for companies. The occupation of land can be for such term as the appropriate Government may think fit, but such term cannot exceed three years from the commencement of such occupation. In such case, though the possession is taken under the provisions of section 36 (1) of the Act, the ownership of the land remains with the person interested in it. This is exactly

contrary to the case of permanent acquisition wherein the possession is taken under section 16 of the Act and thereby the ownership of the land is divested with its title and the title to the land vests in the Government absolutely free from all encumbrances. Section 35 (1) provides for retention of the land by the Government or the company for maximum period of three years and there is no provision in the Act whereby extension of that period can be granted or deemed to be granted automatically. But there is also no specific bar to procure land for further temporary occupation by exercising power under section 35 (1) and (2) from time to time so long as the public purpose subsists. But in absence of the same, the possession has to be surrendered to the owner i.e person interested in the land upon expiration of the maximum period of three years, failing which, it becomes illegal and unauthorized possession. In other words, the occupant is not authorized to retain the land beyond 3 years. Of course the parties can arrive at consensus and the owner can permit the occupier to continue in the possession. But in absence of compliance of requisite procedure, it will not be governed by the provisions of the Act though the possession can not be termed as unauthorized one. In that case it will be governed by the provisions under common law.

5.2. The compensation and the manner in which it is to be received have to be determined by agreement in writing between the Collector and the person interested in the land. If there is any difference between the two, the said

difference is required to be referred to the Court by the Collector as per provisions of section 35 (3) of the Act, which has to be in relation to the sufficiency of the compensation. The difference is when the collector determines the compensation at figure A and in the opinion of the person interested in the land, the compensation has to be at figure B, then it is this difference between the two figures which has to be referred to the Court to inquire whether compensation offered by the Collector is sufficient. Thus, sub-section (3) of section 35 only confers the power of making reference on the question of sufficiency of the compensation or apportionment thereof and not beyond that. If conjoint reading of sub-sections (2) and (3) of section 35 and sub-section (1) of section 36 is made, it shows that the Collector may enter upon and take possession of the land on payment of the compensation or on executing such agreement or on making a reference under section 35(3) of the Act. The period of three years or the stipulated term under the agreement will commence only from the date of occupation of the land. Sub-section (2) of section 36 prescribes what Collector has to do on the expiration of the term. He has to tender to the person interested compensation, if there is any damage done to the land and it is not covered under the agreement and also to restore the land to the persons interested therein. Therefore, it is incumbent upon the Collector to return the possession to the persons interested in the land on expiration of period of three years. The provisions of Section 35 and 36(1) of the Act are made applicable only upto expiration of term or three years from occupation

whichever is earlier. Whereas Section 36(2) and 37 become effective immediately upon expiration of stipulated period only for the limited purpose already stated above. In the circumstances, it is clear that when term of occupation gets over, the provisions of Section 35 and 36(1) of the Act cease to apply. The retention of possession either by consent or unauthorized ceases to be governed by the Act. The only exception is section 37, which provides that at the expiration of the term, if there is any difference about the condition of land or there is any other matter connected with the agreement, the Collector can refer such difference to the decision of the Court. But that would be only when the possession is restored at the expiration of three years and dispute arises in case of condition of land and not otherwise.

5.3. If the present facts are taken into consideration, Mr. Ajay Mehta has informed the court that the rent was revised on January 1, 1997 and raised to Rs. 2=50 paise; again on January 1, 2000 it was raised to Rs.3=75 and lastly on January 1, 2005 it was raised to Rs.5=00 paise and the possession of the land is allowed to be retained beyond the period of three years. Thus, periodically the rent has been revised and increased by the ONGC. The revision has been accepted by the persons interested in the land. This fact is not disputed by Mr. Patel. The ONGC has, therefore, retained possession with the consent of the persons interested in the land. Thus, upon expiration of agreed term or statutory period by implication new agreement has come into existence. In the

circumstances, even when after the expiration of agreed period the occupant has continued to remain in possession, it cannot be said to be unauthorized possession.

5.4. The reference under section 35(3) is different than reference under section 18 of the Act. Under section 35(3), it is the Collector who is bound to make the reference on his own motion when the persons interested in the land differs as to sufficiency of compensation. So is the case for reference under section 37. Whereas under section 18 of the Act, person interested and who has not accepted the award made by the Land Acquisition Officer, has to make written application to the Collector to require him to refer the matter for the determination of the Court. Under section 35(3) the Collector gets power to refer the matter only for the limited purpose i.e for deciding the sufficiency of the compensation or apportionment. Again this has to be for the limited period because provisions of Sections 35 and 36(1) of the Act apply for maximum period of 3 years. Therefore, it is obvious that the Collector gets power to refer the dispute as to sufficiency of compensation which may arise within the agreed term or maximum period of three years. Any dispute which crosses this time limit cannot be the subject matter of the decision of the Court. In other words the Collector's reference has to confine itself to the controversy arising within the prescribed period under Section 35 (1) of the Act. The matter of compensation is contained in Sec. 35 of the Act. In such reference, therefore,

the Court is required to give its decision in relation to difference as to the sufficiency of compensation only for maximum period of 3 years and not beyond that even when the reference is made within stipulated period. Any decision on the reference beyond period of three years cannot be termed as legal and in accordance with the provision of the Act and hence it is without jurisdiction. Of course the parties may take this decision in consideration to determine rent for the period beyond three years, but obviously under the Act it has no application nor it binds parties for the period subsequent to expiration of maximum three years.

5.5. As already seen, it is obligatory upon the Collector to restore possession at the expiration of three years. But if the Collector fails to return the possession on expiry of the stipulated time limit not exceeding three years, what could be the consequences and what remedy would be available to the owner to get back the possession? The Act is silent on these aspects. The possession can be termed as unauthorized unless there is fresh notice u/S. 35(2) or by implied or express consent the concerned occupier is allowed to retain possession even after expiration of three years. If the possession is illegal or unlawful or unauthorized, there is no remedy provided under the Act for the person interested in the land to recover it from the occupier. Moreover, upon expiration of the period, the provisions of the Act will cease to apply, except to the extent they relate to purposes mentioned u/S. 36(2) and 37. Therefore, the

concerned person will have to take recourse only to the remedy that has been provided under common law. In other words, he has to approach the Civil Court by filing suit for recovery of possession on the ground that the possession is unauthorized one.

5.6. In the instant case, there is no evidence on record to show that the Collector had ever made any attempt to ascertain whether any damage has been caused to the land in question. Further it also does not appear that any attempt has been made by him, to recover the possession from the ONGC and to hand it over to the appellants. It also does not appear from the record that the appellants had ever made any application or request in writing to the Collector to recover the possession from the ONGC and to return the same to them. On the contrary, it appears that the ONGC is still in possession of the land and it has been paying the rent to the appellants. Periodically the rent is being revised and till this date it has been revised four times by negotiations between the parties and the revision is always upward. Whether in such circumstances, the argument of Mr. AJ Patel that the ONGC is in unauthorized occupation of the land and the appellants are entitled to receive mesne profits at the rate which is claimed in the application can be upheld. Relevant provisions with respect to mesne profits in CPC as relied upon by him, are as under.

“Section 2(12) of the Code defines mesne profits as under:-

> (12) "mesne profit" of property means those profits which the person in wrongful possession of such property actually received or might with

ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

"Order 20 Rule 12. Decree for possession and mesne profits:- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree,

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until:-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree- holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

From the aforesaid provisions, it appears that wrongful possession of immovable property by the occupant is the essence of a claim for mesne profits and cause of liability of the occupier. In other words, accrual of right to have mesne profits presupposes a wrong, and possession of the person has to be found illegal or wrongful. It is already discussed that the appellants have allowed the ONGC to retain possession beyond the period of three years and

they have also negotiated the revision and accepted the rent all throughout. Hence the possession of ONGC cannot be termed as unauthorized or wrongful or illegal. In that event, the question of awarding mesne profits does not arise at all. Besides as per Order 20 Rule 12 the decree for mesne profits is required to be passed where a suit is filed for recovery of possession of immovable property and for mesne profits. Admittedly, till date there is no demand made by the appellants for recovery of possession nor for mesne profits. On the contrary, they have permitted the occupier i.e. ONGC to continue with the possession while accepting the rent. Under the circumstances, they cannot now be permitted to claim mesne profits.

6. The next issue is whether appellants deserve grant of additional compensation by this Court and if yes, upto what period.

6.1. These lands are situated at village Chalasan. Since it appeared to the concerned authority, namely the Project Manager, ONGC, that it was suitable for extracting oil, he made a proposal, which ultimately culminated into temporary occupation by the ONGC. These are all agricultural lands. It appears that during the period immediately preceding the proposal for acquisition, the appellants were cultivating these lands. This fact has become evident from the evidence of Shambhubhai Bhaichandbhai Patel, Exh. 9, who is appellant of First Appeal No. 2568 of 1999. He owns land bearing survey no.

158/3 admeasuring about 2249 sq. mtrs. According to him, his land was fertile land and formed part of the block along with other lands which were also acquired or occupied for this very purpose. He, therefore, gave evidence on behalf of all the applicants of the Reference Cases before the Court. He has stated that their demand was Rs.700/- per Are by way of rent; whereas the Collector awarded Rs.80/- per Are by award dated 16th September, 1991. He has stated that the land had facility of irrigation and they irrigated the land by drawing water from the bore of Kantibhai Dhanabhai and Hirabhai. He has also stated that they obtained three crops in a year. In the monsoon they grew chilly crop and produced chilly worth Rs.250/- to Rs.300/- per Kyara [square block of land]. According to him, in one Vigha there could be 70 to 75 such Kyaras. He has stated that they used to obtain 350 to 400 mounds of chilly per Vigha. According to him, at the relevant time, the price of chilly was Rs.90/- to Rs.100/- per one mound. He has stated that villages Chalasan and Jotana are very famous for chilly crop and they grow chilly in abundance. He has also stated that in winter, they cultivated Raida and wheat crop. The yield was around 60 mound per Vigha and the prevailing market rate was Rs.90/- to Rs.100/- per mound. In summer, they grew Juvar crop and approximately 1,000 bundles of Juvar could be had from one Vigha. According to the witness, the prevailing market price was Rs.300/- for 100 such bundles and the annual yield was Rs.35,000/- to Rs.40,000/- and 10% of it, was expenditure for the cultivation. He has also stated that they utilized modern equipments, the

chemical fertilizers and pesticides. He has stated that village Chalasan has population of about 2,000 to 2,500 and it has facilities of electricity, water, school, hospital, S.T. Stand, Bank, etc. He has produced judgment delivered by the Civil Court in Reference Cases No. 473/1992 to 480/1992 at Exh. 10 and has also produced the extracts of revenue records at Exhs. 11 to 13 to show what crops they were obtaining. No effective cross-examination has been done by the otherside. The witness has admitted that he has not produced any account for the agriculture. He has denied certain suggestions that have been made to him in the cross-examination. Nothing of any importance is, therefore, elicited from this witness by the otherside.

7. So far as the documentary evidence is concerned, Exh. 10 is the judgment produced by Shambhubhai which is delivered in Reference Case No. 473/1992 and its allied matters by the Court of Assistant Judge, Mehsana. It is dated 3rd July, 1997. The temporary acquisition was made on 17th February, 1988. The Court awarded Rs.2=70 ps., per sq. mtr., as rent of the lands, which were situated in the same village i.e., Chalasan. They were acquired for the same purpose i.e., for drilling oil well by the ONGC. The say of the appellants is that their acquisition is later in point of time i.e., almost after three years and, therefore, rise at the rate of 10% per annum also could be given. It appears that this award was challenged before this Court by the Government, but the appeals were dismissed and the rate of Rs.2=70 paise per sq. mtr., was confirmed.

8. Now the question is whether the appellants deserve any enhancement in the compensation. Since the evidence of Shambhubhai has remained more or less uncontroverted, there is no reason for this Court to disbelieve his version that the appellants obtained three crops in a year and generated income of around Rs.25,000/- to Rs.35,000/- per Vigha. It also appears from the evidence that the land was fertile and with irrigation facility, it yielded good returns to the appellants. In view of the same, the rate of the annual rent has to be such that the appellants stand adequately compensated for the loss which they otherwise might not have incurred but for the temporary occupation. Apart from the evidence of Shambhubhai referred to above, which is quite reliable and it cannot be discarded only on the ground that he has not produced any accounts with regard to agriculture, there is documentary evidence also which substantiates the say of Shambhubhai. Exh. 10 is the judgment of the Ld. Assistant Judge and he has determined the rate of compensation at Rs.2=70 paise per sq. mtr., for the land which was acquired in February 1988. The present acquisition is much later i.e., almost 3 years and 7 months thereafter. There is uncontroverted evidence to the effect that since then the prices have increased. The value of crops has also gone up, meaning thereby the appellants have suffered greater loss in terms of money than the owners of lands forming part of Exh. 10. It is, therefore, obvious that when the prices all around have gone up including the crops mentioned above, the fair

market rent could be assessed at a figure higher than Rs.2=70 paise per sq. mtr. Considering the time factor as well as the other relevant facts stated above, it appears to me that the rate fixed by the Reference Court at Rs.2=70 paise per sq. mtr., is inadequate and it ought to be Rs.3=20 paise per sq. mtr., per annum. I, therefore, decide that the appellants are entitled to receive Rs.0=50 paise per sq. mtr., per annum as additional compensation.

9. The second part of the question is whether this Court can issue direction for recovery of additional compensation for a period beyond three years of the occupation of the land. In the instant case, the occupation was procured on 30th July, 1991. The Ld. Assistant Judge, Mehsana delivered the judgment on 2nd September, 1998 covering the entire period. Obviously, therefore, it is for a period even after the expiration of the statutory period. As I have already concluded that the Reference Court does not have power to decide the question of compensation beyond the period of three years, this Court, while exercising appellate jurisdiction of first instance, cannot have such power beyond the period of three years. This Court has, therefore, no power to direct payment of the amount beyond the statutory period. Nevertheless the parties can take this award as guiding factor for determining future course of action including assessing the revision of rent.

10. To sum up the entire discussion, which can be done while answering the questions stated in paragraph 5 of the judgment, as under:

10.1. Considering the provisions of Section 35 (1) of the Act, the occupant is not authorized to retain the possession of the land beyond the maximum period of three years, unless fresh procedure, as prescribed under Section 35 (2) is followed or parties have arrived at consensus for retention of the possession by the occupant beyond three years. So far as the facts of the case on hand are concerned, the possession of ONGC cannot be termed as unauthorized, illegal and wrongful because of the implied consent of the appellants. Since the Collector under Sections 35 and 36(1) of the Act is required to exercise power in relation to occupation of land for maximum period of three years, he cannot refer the difference as to the sufficiency of the compensation for the period subsequent to expiration of the term agreed upon by the parties or the maximum period of three years. The Court in its decision cannot cover any period subsequent to the expiration of the agreed term or three years. Such decision to that extent cannot be said to be legal and in accordance with the provisions of Chapter VI. It is immaterial whether the Reference is made within stipulated period or afterwards. Further when the Collector fails to act in accordance with the provisions of Section 36 (2) of the Act, on expiration of the maximum period of three years, the person interested in the land has to resort to remedy provided under common law, since the Act is totally silent on this aspect. Even for claiming mesne profits in appropriate case, such person has to take recourse to remedy under common law when the possession of the

land in question is stated to be unauthorized or wrongful. So far as the present case is concerned, in view of the fact that the possession is not unauthorized, the appellants are not entitled to receive any mesne profits. However, the appellants are entitled to have additional compensation for a period of three years commencing from the date of occupation at the rate of Rs.0.50 paise per sq. mtr. For the period beyond three years, if the appellants want additional compensation, they have to approach the Civil Court under common law as subsequent retention of possession is on account of consensus arrived at amongst the parties which is contractual arrangement and not under the Act. Of-course, if parties so intend, it is open for them to take the decision of the Court as a guideline or as basis for determining the rent for further period.

11. This brings me to the last lap of the judgment, where I propose to refer to the decisions cited at the bar.

11.1. Mr. Patel has placed extensive reliance on the judgment delivered by the Division Bench of this Court in the case of General Manager v. Special Land Acquisition Officer, (supra). On the basis of this decision, Mr. Patel has contended that the Court has to consider the plight of the farmers since ONGC had retained the possession beyond the period of three years. He has drawn my attention to the remarks made by the Division Bench “when the lands of agriculturist are taken for exploration, of course, for natural minerals, or for

natural products, it does not mean that the agriculturist are to be exploited. They are required to be paid adequate compensation keeping in mind the principle laid down in the Act. According to him in the present case, the ONGC has simply exploited the farmers by depriving them of their valuable lands and not paying adequate compensation". Here this does not appear to be so, because, the land owners have never made any grievance to the Collector regarding retention of the land beyond three years. The record of the case does not show that efforts have ever been made by the land owners to regain the possession of the land in question. Had they been feeling so concerned about it, they would have approached the Collector with a request to retrieve the possession of the land and return it to them or they could have filed appropriate Suit for recovery of the possession or any other appropriate proceeding to make the Collector act in accordance with Section 36 (2) of the Act. On the contrary, they have agreed to accept the revised rent, even while prosecuting the Reference and thereafter these appeals. So far as the question with regard to scope of Sections 35 and 36 is concerned, it was never the issue before the Division Bench and it has not considered the matter in that focus. From the judgment of the Division Bench, it does not transpire whether in the said case there was periodical revision of rent by the ONGC with the negotiation of owners of the land. So far as the enhancement of the compensation in that case is concerned, it is on the facts of the said case. Mr. Patel has simply relied on the principle enunciated therein for enhancement of compensation and not on

the facts for comparing them with the facts of the present case on the aspects of nature of the land and the yield. While citing this judgment, Mr. Patel has also submitted that the concept of unconscionableness, unfairness, reasonableness and public policy must be taken into consideration. When the contract is unfair and unreasonable and against public policy, such contract would be inconsistent with and violative of any of the provisions contained in Part III and IV of the Constitution of India, which would amount to committing breach of Article 14 and 16 of the Constitution. This argument also cannot be accepted because even at the cost of repetition it is required to be stated that the appellants have not challenged the retention of possession by the ONGC in any manner and they have also not filed any proceedings to obtain declaration that the possession is unauthorized, illegal or it is violative of any of the provisions contained in Part III and IV of the Constitution of India. Not only that but their conduct is contrary to their contentions.

11.2. He has placed reliance on the decision rendered by the Apex Court in the Case of **Gopalkrsihna Pillai & Ors. v. Meenakshi Ayal & Ors., reported in AIR 1967 SC 155**. He has particularly placed reliance on the following passage;

> "In our opinion, this passage does not support counsel's contention. This Court made those observations in a case where the plaint claimed only declaration of title and recovery of possession of immovable properties and made no demand or

> claim for either past or future mesne profits or rent. It may be that in these circumstances,the suit was not one "for the recovery of possession of immovable property and for rent or mesne profits", and the Court could not pass a decree for future mesne profits under Order 20 Rule 12 of the code of Civil Procedure Code. But where, as in this case, the suit is for the recovery of possession of immovable property and for past mesne profits, the Court has ample power to pass a decree directing an enquiry as to future mesne profits, though there is no specific prayer for the same in the plaint. In the aforesaid case, this Court did not lay down a contrary proposition and this was pointed out by Subba Rao, C.J., in Atchamma v. Rami Reddy, ILR 1957 Andh. Pra 52 at p. 56 [AIR 1958 Andh Pra 517 at p. 519]."

and has contended that even if no demand is made, the Court is within its powers to award even future mesne profits. The Apex Court has made these observations in context of Order 20 Rule 12 of the CPC and has specifically put emphasis on the situation where the suit is for recovery of the possession of the immovable property and for past mesne profits. In such a situation, according to the Apex Court, future mesne profits can also be awarded. Here the position is totally different. There is no suit for possession and for past mesne profits. In such event, this decision of the Apex Court will not render any help to the appellants. On the contrary it envisages that there has to be suit for possession, even for claiming past mesne profits.

11.3. The next decision he relied upon is of the Apex Court rendered in the case of **Shyam Charan v. Sheoji Bhai & Anr., reported in AIR 1977 SC 2270**. He has placed reliance on the following :-

> "It would apply and was meant to cover a case where the contractual tenancy terminated before the commencement of the Act, but the suit was filed after its commencement. Such a suit had to be filed in accordance with Section 12 of the Act and attracted the other provisions also. Suppose in this case after the termination of the tenancy in the year 1960 the suit for eviction would have been filed in 1962 the appellant could come under the definition of the term "tenant" even though the termination of the contractual tenancy was before the commencement of the Act. But we are unable to accept the argument that the mere fact that the definition of tenant is retrospective will make the appellant a tenant within the meaning of the Act. That being so, it is plain that his continuing in occupation of the accommodation on and from 22-5-1960 was unauthorized and wrongful and a decree for damages or mesne profits has rightly been awarded for the period commencing on that date and ending on 4-10-1964 when the appellant gave up vacant possession to the respondent."

11.4. The next decision is also of the Apex Court rendered in the case of **Lucy Kochuvareed v. P. Mariappa Gounder & Ors., reported in AIR 1970 SC 1214.**

> "From a plain reading of definition in Section 2(12) it is clear that wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefor. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

11.5. These decisions also will not render any assistance to the appellants because I have already reached the conclusion that the possession is

not unauthorized and the question of payment of mesne profits does not arise at all. Whereas in the first case before the Apex Court the continuation of occupation was unauthorized and wrongful. So far second case is concerned, it was specifically observed by the Apex Court that the wrongful possession of the defendant is very essence for a claim for mesne profits. Thus these decisions support the view canvassed by other side for not awarding mesne profits to the appellants.

11.6. Mr. Patel has also placed reliance on the decision of the Apex Court in the case of Lucy Kochuvareed v. P. Mariappa Gounder & Ors., (supra). He has submitted that the ONGC is a "*State"* within the meaning of Article 12 of the Constitution, and it should not take shelter under technicalities. Here it can be said that the ONGC has not gone by any technicalities since irrespective of the provisions of Section 35 of the Act it has revised the rate of compensation periodically even after expiry of the period of three years. It also appears that by now the substantial rise has been given in the rent. As per the information given by Mr. Mehta, against their claim of Rs.7=00 per sq. mtr., rent of Rs.5=00 per sq. mtr., is being paid to the appellants. This authority therefore, will not render any help to the appellants.

11.7. Mr. Patel has submitted that the Court not only should award mesne profits but also interest thereon. He has placed reliance on the decision

of the Supreme Court rendered in the case of **Mahant Narayana Dasjee Varu & Ors., v. The Board of Trustees, reported in AIR 1996 SC pg.1231**. It has observed as under :-

> "Under Section 2 (12) of the Civil Procedure Code which contains the definition of "mesne profits", interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income."

Needles to say that though there cannot be any controversy with regard to the principle laid down by the Apex Court the fact remains that the appellants are not entitled to receive mesne profits in view of above discussions and, therefore, the question of payment of interest thereon will not arise. For the legitimate period, on additional amount of compensation, interest at statutory rate has already been awarded by the Reference Court. Therefore, the grievance of the appellants does not seem to be well founded.

11.8. Similarly, Mr. Patel has placed reliance on the decision of the Apex Court in the case of **M/s. Marshall Sons & Co. (I) Ltd., v. M/s. Sahi Oretrans (P) Ltd., & Anr., reported in AIR 1999 SC pg. 882**. This decision is also on mesne profits and it is of no use to the appellants for the reasons already stated in this judgment.

11.9. There are other decisions also which have been cited by Mr. Patel, but any reference to the same will be merely repetition in view of the foregoing discussion. Hence, I do not propose to deal with them.

12. As against that Mr. Ajay Mehta has placed reliance upon several decisions of the Apex Court as well as this Court to substantiate his arguments.

12.1. First he has cited the decision of this Court rendered in the case of ONGC v. Pandya Prahladbhai Manilal & Ors.(supra). The learned Single Judge had occasioned to consider the scope of Sections 35 and 36 of the Act. He has drawn my attention to the following observations made by the learned Judge in the Judgment :-

> "It is, therefore, not open to the Collector to make a Reference for determining the compensation, either in a gross sum of money, or by monthly or other periodical payments for the subsequent period after expiration of the temporary acquisition period by resorting to Sec. 35 (3) of the Act. If the acquiring body has entered into any written or oral agreement with the landowners, the acquiring body may retain the lands in pursuance of such oral or written agreement, if any, and such retention will be governed by the oral or written agreement, but certainly the provisions of section 35 of the Act would have no application after the aforesaid temporary acquisition period is over. Whatever amount is fixed between the parties will be governed by the new contract, if any, between the landowners and the acquiring body. Such retention of possession or fixation of amount of rent will be governed under ordinary law, and not under the Act. If the acquiring body has retained the possession by separate agreement between the acquiring body and the landowners, the same would be subject to an agreement between the parties, but in such an

> eventuality, if there is any dispute between the acquiring body and landowners, the Collector cannot make a reference for such period as if it is a reference under section 35 (3) of the Act. In other words, the Collector has no power to make a reference for fixing the amount of rent or compensation for a period exceeding three years from the commencement of such occupation. In a Reference under section 35(3) of the Act, the Court can only determine compensation/amount in connection with the period of three years from the date of taking possession. Considering the aforesaid provisions, it is clear that interested persons can ask for reference to the Court under section 35(3) of the Act if such persons are not satisfied by the sufficiency of the compensation or apportionment fixed by the Collector at the time of taking possession for occupation of the land for a temporary period of three years."

I am in total agreement with the learned Single Judge as I have also formed an opinion that temporary occupation can only be for maximum period of three years and under Section 35 (3) of the Act the difference as to sufficiency of compensation beyond the period of three years cannot be referred to the Court for its decision.

12.2. Mr. Mehta has submitted that the Court cannot enlarge the scope of Reference and travel beyond the issue required to be determined in the Reference. In support of the said submission, he has placed reliance on the decision of the Apex Court rendered in the case of **The Delhi Cloth and General Mills Co. Ltd., v. The Workmen & Ors., reported in AIR 1967 SC pg. 469**. In paragraph 9 of the said judgment, it has been observed by the Apex Court as under:-

> "From the above, it therefore, appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto."

12.3. This principle can safely be applied to the scope of Reference under Section 35 (3) of the Act. Under the scope of Section 35 (3) of the Act, the Court is required to give decision on difference as of sufficiency of compensation only for a period of three years from the date of occupation of the land. Any decision covering subsequent period would be beyond the scope of reference and the Court is not permitted to cover such period.

12.4. Mr. Mehta has controverted the submission of Mr. Patel to the effect that every year 10% rise should be effected in the quantum of compensation. According to Mr. Mehta this principle applies in the case of market value of the land in case of permanent acquisition. So far as the market value of the land is concerned, it has no relevance for temporary occupation under Section 35 of the Act. In support of his submissions, he has relied on the decision of the Apex Court rendered in the case of **Brij Behari Sahai v. State of Uttar Pradesh and its allied matters, reported in (1986) 3 SCC pg. 564**. The Court has in paragraph 5 has observed as under :

> "We agree with the view indicated in Tan Bug Taim v. Collector of Bombay, that temporary occupation of land provided in Part VI is distinct from, and is not included in acquisition of land. We have already pointed out that clause "secondly" in Section 23 (1) of the Act is not applicable to temporary occupation covered by Section 35 of the Act. Statutory solatium as provided in Section 23 (2) of the Act does not apply to a case of damage covered by clause "secondly" in Section 23 (1) itself. "Market value" occurs in the first clause of Section 23 (1) of the Act and sub-section (2) of Section 23 refers to market value. Solatium has reference to market value and the mandate to pay solatium is only in respect of market value. Compensation under Section 35 of the Act has no reference to market value and the actual loss sustained by the persons interested in the land is intended to be compensated. In that view of the matter, to a case of compensation under Section 35 of the Act the provisions of Section 23 (2) of the Act cannot be applied. The claimant is thus not entitled to any solatium on the compensation determined by the High Court in this case."

12.5. On this issue he has also cited the decision of the Division Bench of this Court in the case of **Patel Govindbhai Ambaram v. Special Land Acquisition Officer & Anr., reported in 2006 (2) GLR pg.1152**. The Division Bench has observed as under :-

> "We have also noticed that for computing annual rent of the lands acquired, the learned Civil Judge has adopted the principles of determining the market value for the purpose of permanent acquisition. To us, it appears that the annual rent has been determined by the learned Civil Judge on the principles not applicable in the case of temporary occupation of land. As the State Government as well as the Corporation has acquiesced in the awards passed by the learned Civil Judge, we do not interfere with the same."

12.6. The aforesaid observations of the Apex Court as well as this

Court clearly show that the principles of determining the market value are applicable only in the case of permanent acquisition and they cannot be applied to assess the compensation for temporary occupation of the land. The decision cited by Mr. Patel regarding annual 10% rise are, therefore, not referred to here as they are not applicable to the facts of this case.

13. Mr. Patel has also submitted that no pleading or arguments were made with regard to scope of Section 35 of the Act by the respondents before the Reference Court and hence it cannot be allowed to raise it before this Court for the first time. This submission of Mr. Patel cannot be accepted. It is well known proposition of law that the law point can be raised at any stage of the proceedings. This is neat question of law and the respondents can raise such issue for the first time before this Court.

14. In the end it is directed that the respondents shall pay additional compensation at the rate of Rs.0.50 paise per sq. mtr., for the period of three years commencing from the date of occupation of the land i.e. 30th July, 1991 together with interest at the rate of 9% per annum on the additional amount for that period.

The result is that these appeals are partly allowed with no order as to costs.

[Akshay H. Mehta, J.]

* Pansala.